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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SHAWNA LEA BROWN, Defendant and Appellant.	A122791 (San Mateo County Super. Ct. No. SC062618C)

I.

INTRODUCTION

Appellant Shawna Lea Brown appeals from the denial of her post-acquittal petition for a finding of factual innocence and destruction of her record of arrest (Pen. Code, § 851.8, subd. (e)[1]). She claims that the trial court erred in denying her motion because no reasonable cause exists to believe she committed the offense for which she was acquitted. Applying de novo review, we conclude that the court's contrary determination is correct, and therefore we affirm the ruling.

II.

PROCEDURAL BACKGROUND

On December 13, 2006, an information was filed against appellant and others in connection with the theft of equipment of the type used by disk jockeys (DJs). Appellant was charged with burglary of an inhabited dwelling (§ 460, subd. (a)), receiving stolen

[1] All further statutory references are to the Penal Code unless otherwise noted.

property (§ 496, subd. (a)), and grand theft (§ 487, subd. (a)). Appellant was convicted of the burglary and receiving stolen property charges, but acquitted of grand theft. She was sentenced to three years probation on conditions including nine months in jail.

On appeal from those convictions, appellant challenged the trial court's denial of her motion for acquittal made at the conclusion of the prosecution's case in chief, arguing that the sole evidence against her at trial was the testimony of an accomplice, Banks, whose incriminating testimony was not independently corroborated. Appellant also contended that text messages she allegedly sent to Banks could not be considered corroboration because they were authenticated only by Banks's testimony. We agreed with appellant's contention that there was insufficient evidence to support the conviction and ordered that a judgment of acquittal be entered. (*People v. Brown* (Apr. 30, 2008) A118032 [nonpub. opn.] (*Brown I*).)

Remittitur issued on July 3, 2008. A petition was brought on July 28, 2008, seeking a determination of factual innocence and the destruction of appellant's arrest record, pursuant to section 851.8, subdivision (e). The motion was opposed by the district attorney's office, and the matter was heard and denied by the trial court on August 22, 2008. This timely appeal followed.

III.

FACTUAL BACKGROUND

The summary of evidence presented in appellant's trial for the original charges is restated from our prior opinion in *Brown I*.

From June or July 2006 until the middle of November 2006,[2] appellant lived in one unit of a duplex in San Mateo, as the roommate of a woman named Chonlana Jarawiwat. The two units of the duplex were separated by a common garage that was accessible only through an outer door at the rear, rather than directly from the residence. The garage was used for storage rather than parking, and the door was regularly left open. Appellant had unlimited access to the garage, and entered it frequently.

[2] All further references to dates are to the year 2006 unless otherwise noted.

In July or August, a friend of Jarawiwat's named Paul Maguire stored a number of items in her garage. The items included a turntable in a large box, and other electronic music equipment of the type used by disk jockeys (DJs). Appellant told Jarawiwat that the DJ turntable which Maguire had stored in the garage was an expensive piece of equipment.

In October, Jarawiwat asked appellant to move out within about 45 days. As of November 12, appellant was still living in the duplex unit with Jarawiwat, but had made plans to move to Las Vegas around November 17. Around this time, appellant had as a frequent guest at the unit a man named Jason Banks, whom she had met through a mutual friend, Zachary Pilalas.

On November 12, appellant went into the garage of the duplex unit. Upon her return, she exclaimed to Jarawiwat, "Oh, my God. Paul's stuff has been stolen." Appellant appeared very excited and concerned, and told Jarawiwat that she would report the theft to the police. Jarawiwat did not see her do so, however, during the two hours that Jarawiwat remained at the house afterwards.

On November 14, two San Mateo police officers, Michael Williams and Colin Stewart, went to Pilalas's house.[3] Pilalas told Stewart that the stereo equipment in his bedroom was not his, that Banks had brought it to his house, and that he thought Banks might have stolen it from someone named Shawna. Pilalas described to Stewart where Shawna lived. Williams and Stewart arrested Pilalas and Banks, and seized the DJ equipment that they found in the home. At trial, Stewart identified photographs of the DJ equipment taken from Jarawiwat's garage as being the same items found in Pilalas's bedroom and garage.

[3] It appears from our record, although the jury was not informed of this fact, that a neighbor of appellant's who was a police informant called the police on November 13 and told them that equipment stolen from Jarawiwat's garage would be found at Pilalas's home.

Stewart and Williams then went to Jarawiwat's home, where they met appellant.[4] Jarawiwat was not home when they first got there, but arrived about an hour later, while they were still present. Stewart told appellant that some items might have been stolen from Jarawiwat's home, and appellant responded that some DJ equipment, which she characterized as being Jarawiwat's, had indeed been taken. When Jarawiwat arrived home, she confirmed that appellant had told her about the theft earlier. Stewart showed the DJ equipment that the officers had taken from Pilalas's house to appellant, and then to Jarawiwat, and they each identified it as the equipment that had been stolen.[5]

In response to Stewart's inquiries, appellant identified Banks as the person whom she suspected of having stolen the DJ equipment. She explained that she had showed Banks the DJ equipment a few days earlier, and that he had responded by saying, " 'Don't show me that. I don't want my criminal tendencies to start acting up.' " She also told Stewart that she had been trying to reach Banks all day, by telephone and text message, in an effort to persuade him to return the stolen property.

After Banks and Pilalas were arrested, while they were in a police car being taken to jail, Stewart overheard Banks talking to Pilalas. Banks told Pilalas that "Shawna should be in the back seat with us because it was her idea. She was there when I brought the stuff to your house and we went through it." Banks also admitted to Stewart that he had taken property from Jarawiwat's home.

Banks testified that appellant had shown him the DJ equipment in Jarawiwat's garage, telling him that she wanted someone to take it, sell it, and give her a share of the money. On November 12, Banks took the equipment, put it in appellant's car, and drove it to Pilalas's house, where he stored it, with the intent of selling it later. Banks testified

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[4] Stewart testified that he and Williams did not go to Jarawiwat's home because appellant had called them, but because of Pilalas's statements to him.

[5] When Jarawiwat arrived home later that day, she also tentatively identified the equipment as Maguire's, but was not entirely certain because she had not paid much attention to it.

that he told appellant he had taken the equipment, and that appellant had seen the DJ equipment in Pilalas's garage.

Banks also testified about eight text messages sent to his cell phone on November 14, all of which were signed with the words "SHAWNA B!" (Capitalization in original.) The messages were all sent between 1:13 p.m. and 2:16 p.m. on November 14. Banks testified that the messages came from appellant. The prosecution introduced the text messages into evidence by introducing Banks's cell phone as an exhibit; having him identify the phone and read the messages from it out loud; having him testify that they came from appellant and interpret their meaning; and then moving into evidence sheets of paper on which the text of the messages had been reproduced for the jury to read. The accuracy of the paper copies was also verified through Banks's testimony. Banks's testimony was the only evidence that was introduced in the prosecution's case-in-chief to authenticate the text messages.

The content of the text messages is set forth below. We have numbered them for convenience, and have retained the original capitalization, spelling, and punctuation.

1. "U CLDNT HV WTD? DUDE SHAWNA B!"

2. "DUDE HW LNG TIL UR BK? IM GNA HV 2 GO 2 ZAKS BKZ I AM NOT GNG 2 JAIL SHAWNA B!"

3. "IM SURE ITZ EITHR BN MVD NW OR SOLD SHAWNA B!"

4. "I DNT ND ZAK OR ANY1 BUT U CLN ME SHAWNA B!"

5. "CAN U GT ME THAT CAMERA AND THZ EARPHNZ WHUTEVR 4 THAT 150 BRO? SHAWNA B!"[6]

6. "UR GNG BK OR 2 SEATLE BY FRI. IM BOUT 2 GO 2 JAIL 4 5K WRTH OF STUF SHAWNA B!"

7. "CN U CALL ME SHAWNA B!"

8. "WHEN? SHAWNA B!"

[6] Banks testified that this message referred to an arrangement he had made with appellant in which she offered to pay him $150 to steal a camera from a store for her and give her some earphones he had.

IV.

LEGAL DISCUSSION

In *Brown I*, we held that appellant was convicted solely on the basis of accomplice testimony without sufficient corroboration as required by section 1111. That section provides that: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such proper evidence as shall tend to connect the defendant with the commission of the offense . . . ." We also pointed out that the corroboration must be "by independent evidence which, without aid or assistance from the accomplice's testimony, tends to connect the defendant with the crime charged. [Citations.] To determine if sufficient corroboration exists, we must eliminate the accomplice's testimony from the case, and examine the evidence of other witnesses to determine if there is any inculpatory evidence tending to connect the defendant with the offense. [Citations.] '[Corroboration] is not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value . . . .' [Citation.]" (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543, italics omitted.)

We concluded that the incriminating oral testimony of Banks was not corroborated and could not stand to support appellant's convictions. Moreover, we determined that, under the rules requiring *independent* corroboration, the incriminating text messages Banks allegedly received from appellant were insufficient to support the convictions as well: "[N]othing other than Banks's testimony was introduced by the prosecution to establish that the text messages actually were what they purported to be, i.e., text messages received on Banks's cell phone from appellant. The cell phone itself was introduced into evidence, but only Banks's testimony established that the messages on it actually came from appellant rather than some other person." For these reasons, the evidence was insufficient to sustain the guilty verdict. We reversed the judgment, ordering the trial court upon remand to enter a judgment of acquittal.

Subdivision (e) of section 851.8, states: "Whenever any person is acquitted of a charge and it appears to the judge presiding at the trial at which the acquittal occurred that the defendant was factually innocent of the charge, the judge may grant the relief

provided in subdivision (b)." The relief provided for in subdivision (b) includes the sealing and destruction of any record relating to the arrest underlying the offenses for which acquittal was entered.

However, a finding of factual innocence "shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. In any court hearing to determine the factual innocence of a party, the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court finds that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made. . . ." (§ 851.8, subd. (b).)

In considering the motion, the court is not limited to evidence found to be admissible at trial. For example, the court may consider "declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable," including evidence previously excluded under sections 1538.5 and 1539. (§ 851.8, subd. (b).) The finding of no reasonable cause means that the evidence must be such that a reasonable person would not "entertain an honest and strong suspicion that the person is guilty of the crime." (*People v. Adair* (2003) 29 Cal.4th 895, 904.) Thus, appellant must show that she should not have been prosecuted because there are no objective factors justifying the commencement of criminal proceedings. (*Id.* at p. 909.)

In reviewing a lower court's ruling under section 851.8 that reasonable cause exists to believe the offense was committed, the appellate court's standard of review varies depending on whether the trial court's conclusion was based on a failure of petitioner to meet his or her initial burden or after the burden had shifted to the prosecution. In the former instance, the review is de novo. In the latter case, we review the record to determine if the court's finding is supported by substantial evidence. (*People v. Adair*, *supra*, 29 Cal.4th at pp. 907-908.)

Here, the petition was supported only by defense counsel's reiteration of the procedural history of the case and his assertion that appellant was entitled to the relief requested because of this court's determination that the conviction was not supported by substantial evidence. The trial court concluded that appellant's initial burden of persuasion had not been met, thereby triggering a de novo standard of review on appeal.

In making its finding, the trial court noted that our holding in *Brown I* was based on application of the accomplice/corroboration rule (§ 1111), which differs from the rule regarding factual innocence. The trial court concluded that the accomplice's testimony, including the content of text messages allegedly received by Banks from appellant, raised an "honest and strong suspicion" that justified the prosecution against her. We agree.

If properly corroborated, Banks's testimony and the text messages clearly raise an honest and strong suspicion that appellant was at least an aider and abetter in the theft of the DJ equipment. Banks said that appellant had shown him the DJ equipment in Jarawiwat's garage, telling him that she wanted someone to take it, sell it, and give her a share of the money. On November 12, Banks used appellant's car to take the equipment to Pilalas's house, where he stored it with the intent of selling it later. Banks testified that he told appellant he had taken the equipment, and that appellant had seen the DJ equipment in Pilalas's garage. Additionally, the text messages showed at least that appellant (the alleged sender) was concerned about the possibility the theft would be discovered and she would go to jail. She also exhibited anxiety about speaking with Banks concerning the incident.

Appellant also argues that a finding of factual innocence is supported because Banks's testimony was "inherently unreliable" due to his accomplice status, prior felony conviction, and plea bargain that probably gave him motivation to incriminate appellant. These factors certainly would impact the credibility of Banks as a witness. However, while these deficiencies may not justify a guilty verdict, they are sufficient to give rise to a strong and honest suspicion to an objective person that appellant committed the crimes alleged. We note also that prosecutors often must prove their cases through the testimony of convicted felons whose testimony against others believed to be involved can only be

procured by offering a negotiated plea bargain. To say that cases supported principally by such evidence should not be prosecuted because there are no objective factors justifying their commencement is an unwarranted overstatement which also ignores the realities attendant to criminal prosecutions.

V.

DISPOSITION

The order denying appellant's petition brought pursuant to section 851.8, is hereby affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.